

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
Amendment of Part 95 of the Commission's)
Rules to Provide Regulatory Flexibility in the)
218-219 MHz Service)

WT Docket No. 98-169
RM-8951

To: The Commission

**REPLY COMMENTS OF
IN-SYNC INTERACTIVE CORPORATION**

In-Sync Interactive Corporation ("In-Sync"), by counsel and pursuant to Section 1.415 of the Commission's Rules, hereby submits its Reply Comments in the above-captioned proceeding.¹

Introduction

In-Sync and every other commenter in this proceeding, save one, expressed overwhelming support for the rule changes the Commission proposed in the *NPRM*. Although the Comments differ in scope and degree, it is clear that the Commission's proposals, when implemented with certain refinements, could breathe new life into the 218-219 MHz industry.

Indeed, it is illustrative that only one of the 12 commenters opposed the proposed rule changes. Notably, this party -- AirTouch Paging ("AirTouch"), a narrowband PCS provider -- is not even a 218-219 MHz licensee and has no stated interest in the spectrum. Rather, in a transparent attempt to delay and deflate competition to its existing service, AirTouch argues that adoption of the proposed rules would be "patently unfair" and would "undermine the integrity of

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¹ See Order, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 98-228, released September 17, 1998 (the "*NPRM*"). In-Sync filed its Comments in this proceeding on October 30, 1998.

the auction processes."² Of course, what AirTouch truly is concerned about is that the flexibility proposed to be afforded to 218-219 MHz licensees would erode its market share. Not only are its views inconsistent with the broad Congressional policy objectives promoting flexibility and spectrum efficiency, they are anti-competitive and cannot be seriously considered.

Discussion

I. With Certain Changes Advocated By Commenters, The Commission Should Adopt Its Proposed Rules To Promote Flexibility And Competition.

In recent years, Congress and the FCC have embraced spectrum flexibility and competition as the hallmarks of communications policy.³ As the Commission stated in the *NPRM*, "authorizing a wider variety of services comports with our statutory authority and serves the public interest by fostering the provision of a mix of services."⁴ In furtherance of this mission, the Commission has proposed to change the 218-219 MHz service to permit licensees to use more spectrum more efficiently to provide more services to more people. In this case, more is better.

The vast majority of commenters fully support the Commission's proposals to: (1) grant all properly-filed grace period requests; (2) extend the license term for 218-219 MHz licenses to ten years to "promote regulatory parity among the commercial wireless services"⁵ and "attract necessary capital" into the industry;⁶ (3) eliminate construction benchmarks in favor of a

² AirTouch Comments at 2.

³ See, e.g., *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, FCC 98-231, released September 25, 1998.

⁴ *NPRM* at ¶ 19.

⁵ Comments of Kingdon R. Hughes ("Hughes Comments") at 4.

⁶ Licensees Comments at 4-5.

"substantial service" showing;⁷ (4) permit licensees to operate as private carriers or common carriers; (5) permit licensees to hold both licenses in the same market;⁸ (6) eliminate restrictions on aggregation and partitioning "to achieve the speeds necessary for competitive Internet access"⁹ and increase spectrum efficiency; and (7) eliminate unnecessary technical restrictions. In-Sync and most commenters agree that the technical restrictions in particular should be eliminated because they serve no purpose and "have been the biggest impediment to licensees in their attempts to develop viable service offerings" in the 218-219 MHz band.¹⁰ BSA/HSA note that there is a 2 MHz guard band between the 218-219 MHz frequencies and Channel 13 that is not subject to any of the technical restrictions imposed on the 218-219 MHz band,¹¹ and CTI states that, based on actual tests it conducted, higher power mobile RTUs and the elimination of the duty cycle do not increase the potential for harmful interference to other spectrum users, including

⁷ See Comments of Community Teleplay, Inc. ("CTI Comments") at 9; Licensees Comments at 11; Hughes Comments at 6. Although there is general agreement that the definition of "substantial service" should be sufficiently broad to include niche services, commenters differ on when the showing should be made. See *infra*, Part III.

⁸ See Comments of the Bay Area 218-219 MHz Group at 4; Comments of IVDS/RLV, L.L.C. and Friends of IVDS, L.L.C. at 2; Comments of Boston Spectrum Associates, L.L.C. and Houston Spectrum Associates, L.L.C. ("BSA/HSA Comments") at 10; Comments of 218-219 MHz Licensees ("Licensees Comments") at 13-14; Comments of Commercial Realty St. Pete, Inc. at 4. CTI supports the proposed rule changes for auction winners, but would retain certain restrictions for lottery winners. See *infra*, Part V.

⁹ See BSA/HSA Comments at 10.

¹⁰ Hughes Comments at 8. Sufficient interference protection to Channel 13 is provided by Section 95.861(e) and the conversion to digital television would eliminate the overall potential for interference to Channel 13. See Licensees Comments at 16-17.

¹¹ See BSA/HSA Comments at 9.

Channel 13.¹² As no other party provided contrary information, it would appear that existing technical restrictions serve no purpose.

Only AirTouch disagrees with these proposals, contending that "the proposed revisions to the Commission's rules would so substantially modify the character of the services" and would "undermine the integrity of the auction process" by permitting the 218-219 MHz band to be used for unintended services.¹³ AirTouch also states that narrowband PCS spectrum sold for considerably more than the 218-219 MHz spectrum at auction because of "the fundamental regulatory differences . . . that were intended to govern the spectrum."¹⁴ AirTouch, however, fails to address the fact that, under the present regulatory scheme, 218-219 MHz licensees have not realized any return on what they committed to pay at auction for this spectrum. Unlike PCS, the 218-219 MHz service will never become profitable if unnecessary and burdensome regulations are not relaxed or eliminated. Auction prices paid for 218-219 MHz spectrum can only be justified if the spectrum can be used to generate revenues. Consequently, the Commission's proposal to relax or eliminate restrictions on the provision of services offered by 218-219 MHz licensees contributes to, not "undermines," the integrity of the auction process.

¹² See CTI Comments at 15-18.

¹³ AirTouch Comments at 3.

¹⁴ *Id.* at 5.

II. Installment Payments Should Be Reamortized Over The Remainder Of The Initial License Term With Interest-Only Payments For The Longer Of Five Years From License Grant Or For The First Six Months Following Re-institution Of Installment Payments.

In-Sync and most commenters agree with the Commission that installment payments should be reamortized over the remainder of the initial ten-year license term.¹⁵ Moreover, these commenters believe that interest-only payments should be payable not over two years, as proposed in the NPRM, but over a longer period of time.¹⁶ Based on its review of the Comments, In-Sync believes that interest-only payments should be payable five years from license grant or over the first six months following re-institution of installment payments, whichever is longer.¹⁷

As is clear, 218-219 MHz licensees require the greatest amount of financial relief possible to enjoy the myriad opportunities the new rules will generate. In many cases, licensees may be forced to surrender their licenses unless installment payments are spread out and greatly reduced following completion of this proceeding. As CTI points out, "since installment payment licensees will be in year 5 of this ten year payment term when payments resume, this will result in these

¹⁵ See, e.g., CTI Comments at 12; Comments of MKS Interactive, Inc. ("MKS Comments") at ¶ 11; Licensees Comments at 6-7.

¹⁶ See CTI Comments at 12 (proposing payment of interest-only payments for first six months following re-institution of installment payments); MKS Comments at 11 (proposing four years of interest-only payments); Licensees Comments at 6-7 (proposing five years of interest-only payments).

¹⁷ In-Sync also agrees with CTI that the Commission should, either prior to or contemporaneously with its adoption of rules in this proceeding, favorably act on pending cases affecting the amount of any payments to be made or any refunds to which licensees may be entitled, in order to provide licensees with the necessary certainty to choose whether to retain or surrender licenses and to know the total amount of remaining payments. See CTI Comments at 12-15.

licensees being forced to make a substantial installment payment once payments resume."¹⁸ The Licensees note that "[t]he Commission has previously found that a lump sum payment 'could place a significant burden on licensees.'"¹⁹ Where all parties commenting on the reamortization agree that the passage of time will result in a large initial payment to cover accrued interest, the Commission should accede to the industry's well-reasoned position and extend the interest-only installment payments to the longer of five years from license grant *or* for the first six months following re-institution of installment payments.

III. The "Substantial Service" Showing Should Be Made At The End Of The Extended License Term.

As discussed in its Comments, In-Sync believes that a "substantial service" standard should replace construction benchmarks and that a showing of "substantial service" should be made at the end of the ten-year license term as a condition of license renewal.²⁰ In its Comments, CTI states that "[a]uction winners should be subject to the substantial performance benchmark at year 6 of the extended license term, with license cancellation the consequence for not meeting the benchmark."²¹ For auction winner licensees, the beginning of year 6 would occur in the first quarter of 2001, likely to be less than two years after the Commission completes this proceeding. This is not likely to be a sufficient amount of time for licensees to take advantage of the new opportunities that new rules will generate, secure any necessary financing and provide "substantial service." Moreover, if one thing is clear from the Comments in this proceeding, it is that suitable

¹⁸ CTI Comments at 12.

¹⁹ Licensees Comments at 6.

²⁰ *See* In-Sync Comments at 10.

²¹ CTI Comments at 11.

equipment is not yet commercially available.²² Rather than have to rule on showings beginning in two years on a case-by-case basis, the Commission's resources would be better served by reviewing the progress of all licensees at renewal time. At that time, "substantial service" showings could be analyzed over several years, following adoption of new rules, thereby creating a more complete record for Commission review.

CTI further states that "[a]ny areas unserved by the auction winners at the end of the extended term would be open to competing applications."²³ In-Sync is concerned that this proposal, by focusing on the *area* to be served, could be incorrectly applied to licensees that are providing *bona fide* services to, say, urban regions of the MSA, even though a signal can cover other areas. Rather, as suggested by In-Sync in its Comments, in evaluating whether a licensee is providing "substantial service," the Commission should primarily consider the quality of the service and not just the area of service, in recognition of the kinds of niche services 218-219 MHz licensees will provide.

²² See, e.g., Hughes Comments at 1-2 ("vain" attempt to develop equipment); Comments of Dispatch Interactive Television Company at 3 ("services ... not commercially feasible"); MKS Comments at ¶ 13 (citing "lack of equipment"); Licensees Comments at 11 ("scarcity of commercially viable ... equipment"). Even CTI questions whether commercially viable equipment would be available at year 5 of the lottery winners' license term. See CTI Comments at 4, n.4.

²³ CTI Comments at 11.

IV. Redesignation Of The 218-219 MHz Service To Allow Both Common Carrier And Private Carrier Operations Will Expand Flexible Use Of Spectrum And Promote Competition.

In-Sync, along with other commenters, supports the Commission's proposal to redesignate the 218-219 MHz service to allow both common carrier and private carrier operations.²⁴ As discussed in In-Sync's Comments, in addition to two-way communications, common carrier 218-219 MHz licensees would be permitted to provide one-way communications and RTU-to-RTU communications, and should be entitled to interconnect with PSN or CMRS providers. Allowing such communications will expand the range of services that 218-219 MHz can provide, facilitate the "highest and best" use of the spectrum and, ultimately, promote the initiation of competitive services.

By contrast, AirTouch claims that a revision of the rules to permit one-way paging service would be "patently unfair."²⁵ Clearly, AirTouch feels threatened by the possibility of competition from 218-219 MHz service licensees. This is precisely why the rules should be changed, not why they shouldn't be.

V. The Rules Adopted In This Proceeding Should Be Applied Equally To Auction Winners And Lottery Winners.

In-Sync takes issue with the views espoused by CTI that would apply the new rules to 218-219 MHz licensees that obtained their licenses by auction, but would retain existing rules for those that obtained licenses by lottery. Specifically, CTI would not extend the license term for lottery winners, and would maintain construction benchmarks and assignability restrictions on lottery winners. CTI rationalizes that its position is intended to create:

²⁴ See, e.g., CTI Comments at 18; Hughes Comments at 3-4; Licensees Comments at 2-3.

²⁵ AirTouch Comments at 2.

strong incentives [for lottery winners] to actively pursue meaningful buildout and development of the 218-219 MHz service. If such measures are not taken, development of the 218-219 MHz service in the top nine markets will continue to languish, creating a drag on the entire industry. This service simply cannot afford a passive, slow group of licensees covering the major markets of the country.

CTI Comments at 9-10.

In-Sync finds no fault with CTI's premise, but believes that its proposed remedy would not achieve the desired result. In-Sync believes that many of the lottery winners would take advantage of the new opportunities created by relaxed technical rules and relaxed ownership restrictions, and would be better able to attract financing for system construction and operation. Indeed, In-Sync, already the holder of the largest number of auctioned 218-219 MHz licenses and an investor in lottery licensees, likely would consider increasing its investments in the top nine markets if the new rules put such licensees on par with the auction winners. In this regard, it is the flexibility and other benefits afforded under the new rules that would create the incentive, not the threat of license forfeiture or the inability to assign a license to a party that will develop the market.

Conversely, if CTI's proposals are adopted, it can be expected that some lottery winners would simply forfeit their licenses, creating another black eye for an industry that historically has been marked with abuse and delays. In-Sync believes that its ability to attract capital and develop systems would be more greatly enhanced by extending the same regulatory benefits to the lottery winners than it would be by punishing them with stricter rules. In short, In-Sync prefers the "carrot" over the "stick."

Further, In-Sync agrees with the Licensees that the public interest concerns associated with applying the 218-219 MHz service rules to all licensees "on the same regulatory basis" outweighs

the Commission's rationale in adopting license transfer restrictions and construction benchmarks.²⁶ Such regulatory parity would require Commission staff to administer and enforce one set of rules rather than two, thereby creating greater consistency in the interpretation of policies and rules.

Conclusion

In its Comments in this proceeding, In-Sync endorsed the Commission's efforts to provide 218-219 MHz licensees with financial relief, greater flexibility and more opportunities to provide competitive services. In-Sync also demonstrated that without the expeditious adoption of these rules, it is unlikely that IVDS will ever become a viable service. There is virtually unanimous agreement among the other commenters that the 218-219 MHz service rules should be adopted as proposed in the *NPRM*, with those refinements set out in both In-Sync's Comments and the discussion above.

Respectfully submitted,

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²⁶ Licensees Comments at 13.

CERTIFICATE OF SERVICE

I, Victor Onyeoziri, with the law firm of Rini, Coran & Lancellotta, P.C., do hereby certify that the foregoing "Reply Comments of In-Sync Interactive Corporation" were served on the below listed parties by First Class U.S. Mail this 24th day of November, 1998.

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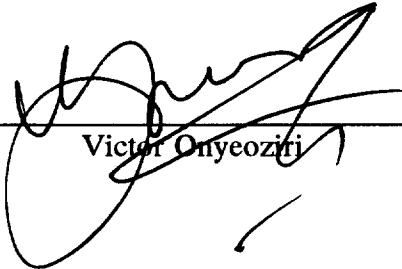
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